Circle City Asphalt, LLC *and* Operating Engineers Local Union No. 103 a/w International Union of Operating Engineers, AFL–CIO. Cases 25–CA–26293, 25–CA–26463, and 25–CA–26546

November 30, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On August 11, 1999, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel filed limited exceptions and a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

ORDER

The National Labor Relations Board orders that the Respondent, Circle City Asphalt, LLC, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All operating engineer employees, including all plant operators and all machine operators, but excluding all office clerical employees, all guards and supervisors as defined in the Act.

(b) Refusing to bargain collectively with the Union by refusing to furnish information regarding the Respondent's employees as requested by the Union by letter dated August 21, 1998.

(c) Failing to recall employees because they have engaged in union activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Meet and bargain with the Union as the collective-bargaining representative of the bargaining unit employees.

(b) Provide the Union with the information regarding the Respondent's employees that the Union requested on August 21, 1998.

(c) Within 14 days from the date of this Order, offer Todd Brackman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Todd Brackman whole for any loss of earnings and other benefits he may have suffered by reason of the failure to recall him, to be computed as set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to recall Todd Brackman, and within 3 days thereafter notify him in writing that this has been done and that the failure to recall him will not be used against him in any way.

(f) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Indianapolis, Indiana facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 1998.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[1] We shall modify the judge's recommended Order to correct inadvertent errors and to conform to our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.*, 325 NLRB 17 (1997). We also shall issue a new notice to employees to conform to the Order.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to meet and bargain in good faith with the Operating Engineers Local Union No. 103 a/w International Union of Operating Engineers, AFL–CIO as the collective-bargaining representative of the employees in the following appropriate unit:

> All operating engineer employees, including all plant operators and all machine operators, but excluding all office clerical employees, all guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union by refusing to furnish information regarding Respondent's employees as requested by the Union by letter dated August 21, 1998.

WE WILL NOT fail to recall employees because they have engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL meet and bargain with the Union as the collective-bargaining representative of the bargaining unit employees.

WE WILL provide the Union with the information regarding the employees that it requested since August 21, 1998.

WE WILL, within 14 days from the date of the Board's Order, offer Todd Brackman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Todd Brackman whole for any loss of earnings and other benefits resulting from the failure to recall him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the failure to recall Todd Brackman, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the failure to recall him will not be used against him in any way.

CIRCLE CITY ASPHALT, LLC

Joanne C. Mages, Esq., for the General Counsel.
S. Douglas Trolson, Esq. (Hoffman, Drewry, Hancock & Simmons), of Indianapolis, Indiana, for the Respondent.
William R. Groth, Esq. (Fallenwarth, Dennerline, Groth & Towe), of Indianapolis, Indiana, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE**,** Administrative Law Judge**.** In a May 11, 1999 complaint, the General Counsel alleges that the Respondent, Circle City Asphalt, LLC, violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing to furnish information in 1998 regarding the Respondent's employees to the Operating Engineers Local Union No. 103, a/w International Union of Operating Engineers, AFL–CIO (the Union). The General Counsel also alleges a violation of Section 8(a)(1) and (5) in 1999 when the Respondent failed to meet and bargain collectively with the Union. Finally, it is alleged that the Respondent violated Section 8(a)(1) and (3) of the Act in March 1999 when it refused to recall employee Todd Brackman for the 1999 production season. The Respondent denied all of these allegations in its May 12, 1999 answer.

This case was tried on May 27, 1999, in Indianapolis, Indiana, during which the General Counsel called five witnesses and introduced written evidence. The Respondent called only one witness and introduced no written evidence. Briefs were then filed on June 30, 1999, by the General Counsel and the Respondent.

II. FINDINGS OF FACT

The Respondent, Circle City Asphalt, LLC (Circle City), located in Indianapolis, produces and sells asphalt. Its chairman is Brian Easley, who owns two other companies in Indiana which supply Circle City with material. Circle City annually sells and ships over $50,000 in goods to out-of-state customers. At its Indianapolis plant, there are three office workers, one plant supervisor, one loader operator, and one groundskeeper. Because of cold winter weather, Circle City's plant operates from April to November, at which time the nonoffice employees are typically laid off until the new season (Tr. 19–21, 41, 46, 69; GC Exh. 1(n)).

Circle City's Indianapolis plant opened in June 1996 (Tr. 33). On July 1, 1996, the Respondent signed a consent agreement with the Union, recognizing it as the employees' bargaining representative. The agreement also provided that:

> (2) The parties do hereby adopt any and all agreements traditionally referred to as Construction agreements as negotiated by and between the various contractor associations and International Union of Operating Engineers, Local 103, for all forms of construction industry work within the territorial jurisdiction of the above state UNION.
>
> . . . .
>
> (4) THIS AGREEMENT OF CONSENT, shall be effective as of JULY 1, 1996 and remain in effect to and including the expiration dates of these Agreements first adopted herein. The EMPLOYER specifically adopts and agrees to be bound as above set out in (2) by any Agreements subsequent to

> the expiration date of these Agreements first adopted herein entered into, between the UNION and the Associations referred to above or any employers covering the same work, unless notice of termination or amendment of any of the Agreements is given in the manner provided herein.
>
> (5) Either party desiring to amend or terminate any or all Agreements must notify the other in writing by certified or registered mail, return receipt requested, at least ninety (90) days prior to the expiration of the Agreements first adopted herein or the expiration date of any subsequent Agreements adopted as herein provided.

(GC Exh. 2.) The aforementioned construction agreement between the Union and the Indiana Constructors, Inc., labor relations division, ran from April 1, 1996, to March 31, 1999 (GC Exh. 3). Pursuant to its agreement with the Respondent, the Union's business agent, John Nunley, dispatched eight or nine employees to Circle City during the lifespan of the collective-bargaining relationship (Tr. 64, 66, 83).

One of the first such dispatches was Todd Brackman, who was sent to Circle City in May 1997 to work as a groundskeeper (Tr. 32–33, 75). Brackman was then promoted to the job of loader operator in the fall of 1997 (Tr. 98–99). At the end of the 1997 season, Brackman was laid off from January 1998 to March 1998. During this period, however, he continued to perform odd jobs for Circle City at less-than-union wages, as Easley told him "we could go around the union" (Tr. 99–100).

Easley fired Plant Manager Dave Blanton in January 1998, and thereafter asked the Union for a replacement. But Nunley said there was nobody available (Tr. 85, 133–134). So, Easley asked Brackman to take the job (Tr. 140–141). Brackman declined, however, saying he was unqualified (Tr. 101).

On February 18, 1998, Easley wrote a letter to the Union giving 90 days' notice of Circle City's "intent to terminate our participation agreement" and stating that "Circle City Asphalt will conform to the terms of the current agreement until May 18, 1998" (GC Exh. 4). On February 24, 1998, union lawyer William Groth responded that Circle City "is seeking to prematurely extricate itself from the current collective bargaining agreement" which did not expire until March 31, 1999 (G.C. Ex. 5). Circle City then responded with a March 2, 1998 letter stating that the February 18, 1998 letter was merely an early notice that Circle City did not intend to continue its relationship with the Union beyond March 31, 1999 (GC. Exh. 6).

Brackman returned to work in the spring of 1998 as the loader operator. Upon returning, he referred Jim Bullock to Easley for the open groundskeeper job. According to Brackman, Easley told Bullock that "[y]ou're not going to join the union, and if you do, you're fired." (Tr. 102–103.) Easley denied ever discussing the Union with Bullock, and specifically denied ever threatening Bullock with termination (Tr. 142). There was no permanent plant manager in the first half of 1998 (Tr. 60). Thus, Easley asked Brackman again, in May and the fall of 1998, about taking the plant manager job. In this connection, Easley said he was "tired of the union," asked Brackman if he was "talking to the union," and reminded Brackman that Brackman would have to choose between the Union and the plant manager job (Tr. 104, 141). Because Brackman never accepted the manager's job, Easley hired James King on an interim basis for the 1998 season (Tr. 61).

In mid-1998 Brackman was injured at work. After taking time off to recover, Easley testified that Brackman's job performance went downhill. Specifically, Easley testified that Brackman refused overtime assignments, did not get along with King, had a fight with his father on the company premises, let the machinery become untidy, watched television on the job, and let unwanted big rocks escape into the asphalt mixture (Tr. 45–53, 58). Nevertheless, Easley never disciplined Brackman (Tr. 62, 99). Indeed, Easley explained that he did not typically discipline his nonadministrative employees because they did not work full time, 12 months a year (Tr. 144). Moreover, Easley still wanted Brackman to be the permanent plant manager in late 1998 because "he still had a potential" (Tr. 148–149). But Brackman denied fighting with his father, goofing off to watch television, or negligently contaminating the asphalt with big rocks (Tr. 109, 113–114).

At the end of the 1998 season, Easley again laid off Brackman, effective December 18 (GC Exh. 11). At the company Christmas dinner, Easley told Brackman that "he didn't want me to go back on the board at the union" and that he would be recalled for work in March (Tr. 105–106, 130–131). But in February 1999, Easley told Brackman that he might not be recalled because "[t]he Union's gave me so many problems, it cost me so much money." But Easley added that "if you went salary, that might be a different situation" (Tr. 108). Also in February, Easley interviewed retired union worker Willie Beverly for the plant manager job, but Beverly was too old to take the job on a full-time basis (Tr. 123–126, 137–140). Then, in a March 2, 1999 letter, Easley notified Brackman that Circle City was "not requesting your services for the upcoming 1999 production season." (GC Exh. 12.) According to Easley, he learned that a former experienced employee and union member, James Dalton, would be available for the job. So, Easley contacted the Union and requested Dalton's services in March (Tr. 43–44, 76–77, 134–135; GC Exh. 14).

In 1998, Union Business Agent Nunley learned that Circle City might not have been paying full benefits to the employees and that the Company might be employing nonunion workers (Tr. 66–67). So, on August 21, 1998, the Union's lawyer sent a letter to the Company's lawyer requesting:

> [T]he names, hire dates, job classifications, wage rates, addresses and Social Security numbers of all non-supervisory and non-clerical persons who presently or in the past twelve (12) months have been employed by your client, Circle City Asphalt. The purpose for this request is to determine whether Circle City Asphalt is complying with the terms of its collective bargaining agreement with Local 103. We request that this information be provided us within ten (10) days from the date of your receipt of this letter.

(GC Exh 7.) The Respondent never provided this information (Tr. 10–11). But according to Easley, he provided that requested information to his lawyer (Tr. 28). Also, Nunley conceded that Circle City paid the money owed for back benefits (Tr. 82). Then, on March 18, 1999, Nunley sent the following certified letter to Easley:

> As you know, by letter dated March 2, 1998, your attorney informed us that you intended to terminate your company's "participation under the Agreement when the Agreement expires March 31, 1999." Because of the pending unfair labor practice charges against your company, you are prohibited from making any unilateral changes on or after March 31,

> 1999 and you are required to adhere to all the terms and conditions of the current Agreement as long as we are engaged in good faith bargaining. We are requesting that such bargaining begin, and I am requesting that you contact me with your available dates and times to begin the bargaining process. I look forward to hearing from you.

(GC Exh 8.) The Union never received a response and the letter was returned undelivered (GC Exh. 13; Tr. 73–74). So, the Union's lawyer sent the same letter to the Respondent's lawyer on April 15, 1999 (GC Exh. 9). The Respondent did not respond to either the March 18 or April 15, 1999 letters (Tr. 10–11). Although a new contract was reached between the Union and the Indiana Constructors in 1999, the Union did not ask Circle City to sign a new consent agreement (Tr. 88).

III. ANALYSIS

The General Counsel's first allegation concerns the Respondent's failure to provide information, such as names and wage rates, regarding bargaining unit employees for the period August 1997 to August 1998. The Union sought this information on August 21, 1998, because it feared that Circle City was employing nonunion employees in violation of the 1996 consent agreement. But the Union's audit of Circle City's operation apparently showed no such violation. Nevertheless, Circle City admitted that it did not supply this information.

It appears that the bargaining unit may have consisted of only one employee—Todd Brackman—during the relevant time period for which the Union sought its information, and perhaps the groundsman as well. In either event, the Respondent's failure to provide this limited information was much ado about very little, but nevertheless a violation of Section 8(a)(1) and (5) of the Act. Accordingly, the Respondent will be required to provide the requested information.

Second, the General Counsel alleges that the Respondent failed to bargain with the Union over the expired March 31, 1999 agreement. Indeed, on March 18, 1999, the Union requested that the Respondent commence bargaining, and the Respondent admitted that it has not met with the Union to bargain. In its brief, however, the Respondent contends that there is "no evidence" that it refused to bargain, such as testimony from a union witness. Moreover, it notes that the Union never asked Easley to sign a new consent agreement after a new contract was reached in 1999 between the Union and Indiana Constructors.

Clearly, the evidence shows that the Union requested that the Respondent bargain and the Respondent admitted that it did not, notwithstanding the Union's failure to send an engraved invitation. Therefore, the preponderance of the evidence is that the Respondent did not bargain. Also, it is no defense that the Respondent notified the Union that it did not desire to continue its relationship with the Union beyond March 31, 1999. Indeed, the Respondent had previously recognized the Union as the employees' bargaining representative. Moreover, the Respondent has not asserted a defense that it was exempt from bargaining because the bargaining unit consisted of only one full-time employee. See *D & B Masonry*, 275 NLRB 1403, 1408 (1985). Therefore, it is concluded that the refusal to bargain likewise violated Section 8(a)(1) and (5). Accordingly, the Respondent will be required to bargain with the Union.

Third and finally, the General Counsel alleges that the Respondent failed to recall Todd Brackman in early 1999 because of Brackman's union activity. The Respondent, however, denies any union animus and further notes that it hired another union member, James Dalton, instead of Brackman for the 1999 season. The parties' competing claims must be evaluated pursuant to the standards of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp*., 462 U.S. 383 (1983). Thus, to prove its 8(a)(1) and (3) allegations regarding the Respondent's failure to recall Brackman, the General Counsel must establish, by a preponderance of the evidence, that his protected union activity was a motivating factor in the Respondent's decision not to recall him. If so established, the burden then shifts to the Respondent to show, also by a preponderance of the evidence, that its action was based on a lawful reason and would have occurred absent the protected activity.

I conclude that the General Counsel has met his *Wright Line* burden. First, Easley made numerous antiunion remarks to Brackman in connection with his efforts to persuade Brackman to leave the union job of loader operator and become the plant manager. For example, in 1998 Easley said he was tired of the Union and told Brackman to choose between the two positions. Then in early 1999, Easley told Brackman that he might not be recalled because "the union's gave me so many problems, it cost me so much money." Second, it is abundantly clear that Easley wanted to disassociate Circle City from Local 103 beginning in February 1998, as evidenced by his premature attempt to terminate the 1996–1999 consent agreement. Also in early 1998, he hired Brackman to perform off-season work in an effort to "go around the union." And thereafter, as discussed supra, Easley attempted to persuade Brackman—perhaps its only employee at the time—to leave the Union. Although the Respondent correctly opines that mere free expression of a company's desire to remain nonunion does not establish union animus, I believe that Circle City's actions and statements, *to switch* from union to nonunion, are a different matter. Third, the General Counsel correctly notes that the Respondent's failure to provide the Union with requested information and failure to bargain constitutes evidence of union animus. Based on the foregoing, it is therefore concluded that the preponderance of the evidence establishes that Circle City possessed union animus and an illegal motive not to recall Brackman.[3]

Turning to the Respondent's defense, it is glaring that the record contains no reason at all for Easley's March 2, 1999 decision that Brackman's services were not being requested for the upcoming season. Although there is some evidence of Brackman's poor job performance in late 1998, the Respondent does not allege this to be a factor in Brackman's nonrecall for 1999. Indeed, Easley testified that he still wanted Brackman to become the plant manager in late 1998. As for the Respondent's argument that Easley wanted to replace Brackman with the "more qualified" union member, James Dalton, the record contains no evidence of Dalton's superior qualifications other than Easley's self-serving characterization. Moreover, the Respondent misreads the record in claiming that Easley was trying to hire the "superior" Dalton as early as 1998. Also, Easley's

[3] This analysis does not take into account the disputed evidence regarding Easley's alleged threat to groundsman Jim Bullock that Bullock would be fired if he joined the Union. Easley denied the threat, Brackman testified that Easley said it, and Bullock never testified. In view of the relatively equal credibility of Easley and Brackman, and the resolution of the *Wright Line* matter above, it is unnecessary to decide whether Easley in fact made the threat.

attempt to hire retired union member Willie Beverly in 1999 further belies the contention about Dalton's superiority. The plain fact is that Easley punished Brackman for not accepting a management position. Thus, the Respondent's subsequent hiring of Dalton, as a union replacement for Brackman, does not absolve City Circle of its violation of Section 8(a)(1) and (3) regarding Brackman. Therefore, the Respondent will be ordered to offer Brackman reinstatement, with appropriate backpay.

CONCLUSIONS OF LAW

1. The Respondent, Circle City Asphalt, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Operating Engineers Local Union No. 103, a/w International Union of Operating Engineers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Pursuant to paragraphs 5 and 9 of the General Counsel's complaint, the Respondent violated Section 8(a)(1) and (3) of the Act by failing to recall employee Todd Brackman for the 1999 production season.

4. Pursuant to paragraphs 7 and 10 of the complaint, the Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union since August 21, 1998, with information regarding the Respondent's employees.

5. Pursuant to paragraph 8 and 10 of the complaint, the Respondent violated Section 8(a)(1) and (5) of the Act by failing to meet and bargain with the Union after March 18, 1999.

6. The unfair labor practices of the Respondent, set forth in paragraphs 3, 4, and 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]